

4 Official Opinions of the Compliance Board 163 (2005)

EXECUTIVE FUNCTION EXCLUSION – DISCUSSION OF PROCEDURES FOR SCHOOL BOARD’S RECOMMENDATION TO GOVERNOR ABOUT BOARD VACANCY, HELD TO BE OUTSIDE THE EXCLUSION

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Jim Lee
Carroll County Times

The Open Meetings Compliance Board has considered your complaint alleging that the Board of Education of Carroll County (“County Board”) violated the Open Meetings Act in connection with a meeting held on August 17, 2005.

For the reasons explained below, we conclude that the August 17 meeting did not involve an executive function outside the scope of the Open Meetings Act, as the County Board evidently believed. Because the County Board failed to meet the Open Meetings Act’s requirements, a violation occurred.

I

Complaint and Response

The complaint alleged that the County Board violated the Open Meetings Act when, on August 17, it held an “unannounced, unadvertised meeting for the purpose of discussing candidates who had applied to fill a vacant position on the [County Board.]” As we understand it, when the *Times* questioned the legality of the meeting, the paper was told that it involved an executive function and thus the Open Meetings Act did not apply.¹ The *Times* questioned this assertion, leading to the filing of the complaint.

In a timely response on behalf of the County Board, Edmund J. O’Meally, Esquire, argued that the Act was not violated because the County Board was engaged in an executive function on August 17. The vacancy on the County Board resulted when the former vice-chair of the County Board announced her resignation

¹ This exclusion, with exceptions not relevant here, is set out in §10-503(a)(1)(i) of the Act. Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

on July 25, 2005. A vacancy on the County Board is filled by the Governor. *See* §3-401(d)(2) of the Education Article, Annotated Code of Maryland.

Following discussions with the Governor's Office, a consensus was reached on a process for filling the vacancy. The County Board would solicit applications from interested individuals and then recommend candidates for the Governor's consideration. The purpose of the August 17 meeting was explained as follows: "The meeting ... was held for the limited purpose of discussing the procedural guidelines that the [County] Board would follow in considering the applications and interviewing the candidates. ... [T]he product ... was the development of guidelines that were later followed at a public, televised meeting on August 31 ... [at which] the Board reviewed the guidelines, welcomed citizen comments, interviewed ... candidates ... and publicly deliberated before voting on three finalists."² No candidates were considered on August 17. The County Board included with its response correspondence between the County Superintendent of Schools and the Governor's Office and draft minutes of its August 31 meeting.

In support of its position that the August 17 meeting involved an executive function, the County Board explained that, "by meeting to discuss the procedural guidelines that it would follow in the selection process, it was acting in a true executive function capacity in that it was meeting for the purpose of *administering* existing law rather than for the purpose of making policy decisions" (emphasis in original). The County Board cited as support for its position 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 123 (1995) (Opinion 95-5)³ and a letter addressed to Mr. O'Meally from Assistant Attorney General Jack Schwartz, then-Chief Counsel for Opinions and Advice, dated May 24, 1994. Both of these documents addressed the role of a county board in the selection of a school superintendent.

II

Analysis

The Open Meetings Act generally does not apply to a public body while it is engaged in an executive function. §10-503(a)(1)(i). When a public body is engaged in an executive function, it need not give notice of the meeting, comply with any of the Act's requirements about public observation of the meeting, or keep minutes.

In §10-502(d), the term "executive function" is defined as follows:

² Following submission of the County Board's recommendations, at the request of the Governor's Office, the County Board subsequently voted during a public meeting on September 14 to name its top choice for the position.

³ For brevity's sake, we shall hereafter cite our opinion volumes as *OMCB Opinions*.

(1) “Executive function” means the administration of:

- (i) a law of the State;
- (ii) a law of a political subdivision of the State; or
- (iii) a rule, regulation, or bylaw of a public body.

(2) “Executive function” does not include:

- (i) an advisory function;
- (ii) a judicial function;
- (iii) a legislative function;
- (iv) a quasi-judicial function; or
- (v) a quasi-legislative function.

In a lengthy series of opinions applying the definition of an executive function, we have distilled the analysis into two distinct steps. The first question is whether the topic of discussion falls within the definition of any other defined function. If it does, the statutory definition precludes it from being considered an executive function. The second question is whether the discussion involves “the administration of” a state or local law or a public body’s rule, regulation, or bylaw. If not, it cannot be considered an executive function. *See, e.g., 3 OMCB Opinions 105, 107 (Opinion 01-7) (2001).*

As to the second step, the key issue is whether the matter under discussion involves the administration of existing law or policy, as distinct from policy development. *Id.* Implicit in this aspect of the definition, and made evident in our prior opinions, are two subsidiary points: that there exists an identifiable prior law to be administered, and that the public body holding the meeting is responsible for administering the law. If either is not true, the public body is not administering the law, as required by the definition of “executive function.”

While a matter may appear to be of an administrative nature, such as development of procedures, the executive function does not extend to issues of first impression with which a public body might deal, and that are not linked to an existing, identifiable law that the public body is administering. For example, in 1 *OMCB Opinions 113, 115 (Opinion 95-2) (1995)*, we held that a public body’s discussion of how to accommodate a large number of visitors in advance of a public meeting involved formulating new policy to address the unanticipated situation and,

therefore, did not qualify as an executive function. The public body was creating a policy in an area not covered by prior law.

As the County Board acknowledged, the result of its August 17 meeting was the development of guidelines that it would follow at a public meeting on August 31 to identify candidates for recommendation to the Governor.⁴ This was the creation of policy to deal with a new situation. It covered important matters like the opportunity for citizen comment and limitations on the questions that could be posed to applicants. This situation is distinguishable from 3 *OMCB Opinions* 39, 43-44 (2000) (Opinion 00-10), in which we held certain internal housekeeping matters of a county board of education to be an executive function. None of these activities – presenting a document for signature, for example, or arranging for food and beverages at ceremonial events – involved determining the process of handling a matter of considerable public importance.

Furthermore, we do not see how a public body can be administering a law unless the public body is vested with legal responsibility for its administration. In this case, it is the Governor, not the County Board, who is charged with filling the vacancy on the County Board. While it is entirely reasonable for the Governor to solicit input from the County Board in making his decision, the County Board could identify no responsibility assigned by law to *it* that it was administering on August 17.

The authorities cited by the County Board are inapposite. They dealt with the actions of a county board of education in connection with selection of a new school superintendent, pursuant to provisions of the State's education law that vests the broad with responsibility for administering the law. The reasoning in the opinion and the advice letter does not extend to the meeting at issue, because the Governor, not the County Board, is responsible for filling this vacancy.

⁴ While it might be argued that the procedure was already developed in advance of this meeting, in that it was articulated in a letter dated July 28, 2005 from Dr. Charles I. Ecker, County Superintendent of Schools, to Ms. Doreen A. Riggin, Deputy Secretary of Appointments in the Governor's Office, we understand the County Board's response as indicating that the August 17 meeting involved adopting the procedures as those of the County Board. The County Board did not suggest, nor do we infer based on its response, that the purpose of the meeting was merely a briefing on an already established policy, rather than deliberation on the process that the County Board would decide was to be used.

III

Conclusion

The Open Meetings Compliance Board finds that the County Board's meeting on August 17, 2005, did not fall under the Open Meetings Act's executive function exclusion. Consequently, the Act applied to the meeting, and the County Board's failure to comply with the Act's requirements was a violation.

OPEN MEETINGS COMPLIANCE BOARD

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